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IN THE
COURT OF APPEALS OF INDIANA

MARQUISE SHIPP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0609-CR-540
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
Cause No. 49G20-0505-FA-88140

SEPTEMBER 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Marquise Shipp appeals his three convictions for Dealing in Cocaine as a Class A felony. He was sentenced to an enhanced sentence of 40 years on each felony with the sentences to run concurrently.

Upon appeal, Shipp presents five arguments as follows:

I. That two deputies in the courtroom at the time the confidential informant testified, were erroneously permitted to testify as to certain hand gestures made by Shipp at the time.

II. The prosecutor made improper comments during closing argument.

III. Certain evidence was admitted without proper foundation.

IV. The testimony of the confidential informant was unreliable because of his self-interest in testifying for the prosecution.

V. The court erred in imposing an aggravated sentence.

I.

Over objection, two sheriff's deputies in the courtroom for security purposes were permitted to testify that they observed Shipp making hand gestures toward the confidential informant "like he was pulling the trigger on a gun." (Tr. 335) and ran his index finger from "his ear to down below his neckline" (Tr. 330). Shipp objected upon grounds of relevancy. The court ruled, however, that such gestures might reasonably be interpreted as an attempt to intimidate the witness, thereby reflecting a consciousness of guilt.

Shipp argues here that the deputies' testimony was not probative as to whether the gestures were in fact threatening to the witness. He further argues that the evidence was in violation of Indiana Evidence Rule 404 (B), which prohibits evidence of other crimes or bad acts in order to establish his character or a propensity to commit the crimes charged.

First, it is important to note that evidence is relevant if to any degree it has a tendency to make a material fact more probable or less probable. Vandivier v. State, 822 NE2d 1047 (Ind. Ct. App. 2005), trans. denied. The question of relevance is for the discretion of the trial judge. Pope v. State, 737 NE2d 374 (Ind. 2000)

Here the trial court, in its discretion, stated that the gestures by Shipp could reasonably be determined to be threatening and intimidating to the witness and thus reflect a consciousness of guilt on the part of Shipp. This ruling comports with the established law that consciousness of guilt may be shown by threats or attempts to intimidate witnesses for the prosecution. Cox v. State, 422 NE2d 357 (Ind. Ct. App. 1981); Johnson v. State, 472 NE2d 892 (Ind. Ct. App. 1985) ; 29 Am. Jur. 2d, Evidence, § 316. In this context, we hold that such evidence does not run afoul of Indiana Evidence Rule 404 (b), which prohibits evidence of other bad acts to establish the character of the defendant.

In a related argument, Ship maintains that a balancing process must be used in assessing whether such evidence should be admitted. Employing Indiana Rule of

Evidence 403, he argues that any probative value of the evidence of Shipp's in-court gestures was substantially outweighed by the danger of unfair prejudice.[1]

Shipp cites to Carson v. State, 659 NE2d 216 (Ind. Ct. App. 1995), abrogated on other grounds by Hicks v. State, 690 N.E.2d 215 (Ind. 1997), in support. In Carson, the court correctly observed that Rule 403 specifically provides that although evidence may be relevant such evidence "may be excluded" if its probative value is substantially outweighed by unfair prejudice. (Emphasis supplied). That case involved a drive-by shooting at the home of the victim's mother one day after the victim was murdered. Carson was not directly connected to the drive-by shooting but because Carson and the victim were residents of rival neighborhoods, the State proffered the evidence on the ground that it met the "motive" exception to evidence forbidden by Rule 404 (b) and further that it tended to show Conner's consciousness of guilt. The court rejected the "motive" basis for admissibility and further held that because the connection between the shooting of the victim at a convenience store and the subsequent drive-by shooting was tenuous, Carson's shooting of the victim "has very little probative value to prove Carson's consciousness of guilt" as to the murder of the victim.

Our case is more closely akin to Robinson v. State, 720 NE2d 1269 (Ind. Ct. App. 1999), in which this court held evidence that the defendant attempted to "intimidate [the arresting officer] with his purported status in the community" reflected a consciousness of guilt of the offense of driving under the influence.

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[1] Although no objection on this basis was interposed at trial, we will consider the position now taken by Shipp.

To the extent that Shipp's gestures may be deemed inconclusive either as to the intimidating nature of the gestures or to reflect a consciousness of guilt, such goes to the weight to be given such evidence not to its admissibility. See Hunter v. State, 578 NE2d 353 (Ind. 1991).

Finally, it is unquestioned that the decision concerning the relevance of proffered evidence is within the sound discretion of the trial court. Pope v. State, 737 NE2d 374 (Ind. 2001). That principle applies even if the evidence is of marginal relevance. Smith v. State, 730 NE2d 705 (Ind. 2000). The same deferential standard is given to a determination by the trial court that any asserted unfair prejudice does not outweigh the probative value of that evidence. Bostick v. State, 773 NE2d 266 (Ind. 2002). Given our standard of review, we cannot say that the trial court abused its discretion in admitting the testimony concerning Shipp's courtroom gestures.

II.

Shipp argues that the prosecutor was guilty of misconduct during closing argument. Although no objection was made to such statements, Shipp claims fundamental error dictating reversal.

The prosecutor made the following statements to the jury:

> "The value of the narcotics and the kind of people that deal in narcotics, put the neighborhoods around 34th and Garrard in Speedway, in danger. Not only people that were dealing drugs, but also the people that were neighbors because bullets know no names. Where there are violent acts that result around people dealing cocaine, other people get hurt also. . ."Help out the people that live over there in Speedway and the people that live in that area of the Garrard Street

> address. Finish what the detectives started and find Marquise Shipp guilty of dealing cocaine three times. . ."

Transcript at 348-49; 360.

We agree with Shipp that the first comment constituted prosecutorial misconduct. Oldham v. State, 779 NE2d 1162 (Ind. Ct. App. 2002), trans. denied. In the case before us, there was no evidence of violence, or the use of guns and bullets. There was an implication, however, that Shipp promoted such use, was a dangerous person, and therefore placed the neighbors in danger of their lives. Such comments are not to be condoned.

The question is, however, whether such statement rises to the level of fundamental error. In Oldham, we found admission of certain evidence and prosecutorial misconduct during closing argument to be fundamental error. There, guns found in Oldham's garage were admitted into evidence although neither of the guns was connected to the murder, which according to the prosecutor was apparently the result of a drug deal gone bad.[2] Furthermore, the erroneous admission of the unrelated .38 handgun led to a comment from the prosecutor that the .38 caliber firearm was " the weapon of choice." Under these circumstances, we held that although there was evidence sufficient to find Oldham guilty of murder the conviction was so tainted as to require reversal.

Absent the erroneously admitted evidence and the prosecutor's comments in Oldham, this court was unable to conclude that the verdict and judgment would necessarily have been the same. We were unable to hold the errors harmless.

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[2] Oldham was not charged with a drug offense nor was there evidence that drug dealing was involved.

Our case falls on the other side of the fundamental error analysis. An error is harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as to not affect a party's substantial rights. Brown v. State, 770 NE2d 275 (Ind. 2002). Here, the evidence was overwhelming that on three separate occasions the confidential informant made controlled drug purchases from the defendant. The informant's movements were monitored and his conversations with Shipp were recorded in each instance. On two of the occasions, police surveillance video included images of Shipp himself with the informant.

Given the evidence in this case, we are confident that the prosecutor's comment played no role in the jury's verdict. Accordingly, we hold the overzealous comment to be harmless error.

The second comment inviting the jury to help out the neighbors in Speedway was not as egregious as the first comment. Nevertheless, it injected an extraneous and inappropriate factor into the case. Be that as it may and in light of the evidence heretofore discussed, we hold such comment to be harmless error.

III.

Shipp challenges the foundation established for admission of an audiotape of a phone call arranging a drug purchase, a videotape of the third transaction, plus a transcript of the video recording. It is his position that the confidential informant attempted to lay the foundation by stating that he had listened to the audiotape and had watched the video, and that the transcript accurately reflected the audio of the videotape.

The informant stated that what he saw and listened to were "a true and accurate representation of what was going on at the time." (Tr. 265)

Shipp concedes that an adequate foundation in the form of authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Indiana Evidence Rule 901 (a). If there is a reasonable probability that the item is what it is claimed to be, it is admissible. Lockhart v. State, 671 NE2d 893 (Ind. Ct. App. 1996)[3]

As to the audiotape of the phone call between the informant and Shipp, the informant testified that he had listened to the tape and it accurately represented what was said by both parties during the call. This evidence was sufficient to establish admissibility.

The videotape made during the third drug transaction was also admissible in that Detective Poskon, who captured the video images and accompanying audio, testified that he watched and listened to the tape offered as State's Exhibit 13 and that it was the same tape which he captured during the transaction itself. In addition, the informant who was a party to the matters being video and audio recorded, also testified that the tape and audio accurately depicted the actual occurrence. Again, the testimony suffices for purposes of admissibility.

[3] We note with approval that counsel has scrupulously observed and recited the applicable standard of our appellate review with regard to her various arguments without diminishing the strength and efficiency of the arguments appropriately presented. Her unvarnished forthrightness does her credit and is commended.

The transcript of the audio portion of the tape was also offered. The court permitted the jury to use the transcript as an aid to follow along with the audio but cautioned the jury that the transcript was not evidence of what was said on the tape. They were told that they must decide for themselves what was said. This course of action was within the court's discretion. Sharp v. State, 534 NE2d 708 (Ind. 1989), cert. denied, 110 S.Ct. 1481, 494 U.S. 1031, 108 L.Ed.2d 617 (1990); See Tobar v. State, 740 NE2d 106 (Ind. 2000).

The trial court committed no error with regard to the audio and video recordings and in permitting the jury to use the audio transcript as an aid.

IV.

The appellant argues that because the informant received a benefit from his testimony in that he received favorable treatment as to his own unrelated offense, his testimony is unreliable and as the only direct evidence of Shipp's guilt, is insufficient to support the convictions. This is merely a request for us to reweigh the evidence. We will not do so. Dixson v. State, 865 NE2d 704 (Ind. Ct. App. 704), trans. denied.

V.

The trial court sentenced Shipp to concurrent enhanced terms of 40 years on each Class A felony conviction. The trial court found as mitigating the fact that the defendant was supporting his eight-year-old daughter but found that fact to be attenuated because Shipp was doing so under an agreement with the child's mother and had not obtained a court order for a specified amount. The court also found that "due to the number and severity of the prior criminal activity that it outweighs the mitigating activity." (Tr. 375)

As to the criminal history, the court alluded to a 1996 D felony conviction for Attempted Theft and a 1999 D felony conviction for Criminal Recklessness for which he was sentenced for a Class A misdemeanor. In addition, the court took note of two Class A misdemeanor convictions, Driving While Suspended and Possession of Marijuana.[4]

We are unable to agree that Shipp's support of his daughter is "attenuated" merely because he failed to obtain a formal court order. We hold that under the circumstances of this case, the mitigating factor is entitled to more weight than was given it by the court.

Nevertheless, we note that the court did not impose the maximum sentence of 50 years for the three convictions. Even given the mitigating factor of child support, we are unable to say that such necessarily balances equally with his criminal history. While a different sentencing authority might well have chosen to impose the advisory thirty-year sentence for each crime, we cannot say that the court's conclusion that the aggravating circumstance outweighed the mitigating circumstance was unreasonable. Accordingly, we hold that the sentence imposed was not an abuse of discretion. See Julian v. State, 811 N.E.2d 392 (Ind. Ct. App. 2004), trans. denied.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.

[4] The court did not cite the fact that Shipp was on probation at the time he committed the instant offenses.